



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 199 OF 2009**

**GODFREY KINUU MAINGI**

**JUSTUS MURUNGI**

**JOSEPH NTURIBI MWITHIMBU**

**HARUN MBURUNGU**

**ANDREW GIKUNDA.....APPELLANTS**

**VERSUS**

**NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY....RESPONDENT**

**RULING**

1. The Appellants have filed a notice of motion dated 4<sup>th</sup> June, 2015 seeking stay of execution of the award of the Co-operative Tribunal in Co-operative Tribunal Case No. 230 of 2006 made on 2<sup>nd</sup> April, 2009 pending the hearing of the intended appeal and leave to appeal against this court's judgment delivered on 22<sup>nd</sup> May, 2015.
2. The Respondent filed a preliminary objection to the application on 24<sup>th</sup> June, 2015 which preliminary objection this court ordered to be heard first. The grounds upon which the preliminary objection was brought is that; the application dated 4<sup>th</sup> June, 2015 is misconceived, and non-suited in that under Section 81 of the Co-operative Societies Act Cap 490 Laws of Kenya, no appeal lies to the Court of Appeal, final decision of the High Court; that the same are res judicata Nairobi High Court Civil Appeal No. 575 of 2010 (GODFREY KINUU MAINGI, JUSTUS MURUNGI, JOSEPH NTURIBI MWITHIMBU, HARUN MBURUGU and ANDREW GIKUNDA v. NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY) specifically;
  - a) application dated 17<sup>th</sup> December, 2010 whose ruling was delivered on 22<sup>nd</sup> September, 2014
  - b) application dated 25<sup>th</sup> September, 2014 whose ruling was delivered on November, 2014
  - c) The same is otherwise an abuse of this honourable court's process and waste of its precious judicial time.
3. The preliminary objection was canvassed by way of written submissions. Learned counsel for the Respondent submitted that this court's decision was final under Section 81 (3) of the Co-operative Societies Act and that the Appellants have no right of appeal to the Court of Appeal. That in dismissing this appeal, the court confirmed the decision of the Co-operative Tribunal. He urged

this court to consider the arguments of one Miss. Wamucii in the ruling of Lady Justice Aburili in Nairobi High Court Civil Appeal No. 575 of 2010 GODFREY KINUU MAINGI, JUSTUS MURUNGI, JOSEPH NTURIBI MWITHIMBU, HARUN MBURUGU and ANDREW GIKUNDA v. NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY where Miss. Wamucii conceded that her clients, Nthimbiri Farmers Co-operative Society had no right to appeal to the Court of Appeal. He submitted that this matter is res judicata since there was an order for stay over the same decree. Counsel urged court to go through the replying affidavit and the ruling of Lady Justice Aburili mentioned above to get the chronology of events.

4. In response, learned counsel Miss. Muhoro stated that Article 163 of the Constitution gives parties an automatic right of appeal where a parties Constitutional right has been breached. She contended that this application is not res judicata since the orders sought here are not similar to those issued by the ruling of Mwita J.
5. Mr. Arithi contended that Article 163 does not apply in this case for the reason that it applies to the procedure of the Supreme Court. He affirmed that the ruling of Aburili J. supports their matter.
6. A preliminary objection was defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** as follows:-

*"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop..." (Emphasis own).*

7. In **George Oraro v. Barak Mbaja [2005] 1 KLR 141** J.B. Ojwang (as he then was) stated as follows:-

*"The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..." (Emphasis mine)*

8. It is thereby important to first consider whether or not the preliminary objection herein meets the threshold set out in **Mukisa Biscuit** (supra). On its second point that this matter is res judicata, the Respondent referred court to the ruling of Aburili J and the replying affidavit dated 3<sup>rd</sup> July, 2015 for purposes ascertaining the chronology of events related to this matter. Further, to establish whether or not this application is res judicata, this court will have to consider the ruling of Mwita J and in fact Mr. Arithi urged that the said be looked into. From the foregoing, it is clear that the second point in the in the preliminary objection dated 24<sup>th</sup> June, 2014 will require factual information and does not therefore meet the threshold for a preliminary objection and is therefore not sustainable.
9. **The upshot is that the preliminary objection dated 24<sup>th</sup> June, 2014 is dismissed. The application shall be heard on merit. Costs shall abound the outcome of the suit before the trial court.**

Dated, Signed and Delivered in open court this 30<sup>th</sup> day of July, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellants.

..... for the Respondent.